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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6792

DATE COMPLAINT FILED: March 6, 2014

DATE OF NOTIFICATION: March 11, 2014

LAST RESPONSE RECEIVED: May 2, 2014

DATE ACTIVATED: May 28, 2014

ELECTION CYCLE: 2014

EXPIRATION OF SOL:

May 30, 2018 (earliest)

September 23, 2018 (latest)

COMPLAINANT:

Maria Kelso

RESPONDENTS:

Sean Eldridge

Sean Eldridge for Congress and Michael Oates in
his official capacity as treasurer

Hudson Valley Economic Development
Corporation

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30101(8)(A)(i)¹

52 U.S.C. § 30118(a)

11 C.F.R. § 100.52

11 C.F.R. § 109.20

11 C.F.R. § 109.21

11 C.F.R. § 114.2(b)(1)

INTERNAL REPORTS CHECKED:

FEC Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns whether congressional candidate Sean Eldridge used video footage belonging to a corporation without charge, resulting in the receipt of an in-kind contribution. The Complaint alleges that Eldridge aired a campaign ad containing footage that the Hudson

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

1 Valley Economic Development Corporation ("HVEDC") created and used in its own
2 advertisement, resulting in a prohibited in-kind corporate contribution to Eldridge's authorized
3 committee, Sean Eldridge for Congress and Michael Oates in his official capacity as treasurer
4 (the "Committee"), in violation of 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)). The

5 ~~Complaint also alleges that, if the original HVEDC video was produced for the purpose of~~
6 creating footage for Eldridge, then the original video should be viewed as a coordinated
7 expenditure made on behalf of Eldridge.

8 Respondents argue that the footage used in the campaign ad was not identical to the
9 footage featured in the HVEDC ad, and that in any event, HVEDC's footage was publicly
10 available and comprised only a small portion of Eldridge's campaign ad, thus making any
11 violation of the Act *de minimis*. The Committee does not state how it obtained the footage,
12 however, and the circumstances indicate that the footage was not downloaded from a publicly-
13 available source.

14 The record before the Commission suggests that the Committee used video footage in a
15 campaign ad that a corporate entity created and funded. There is no indication that the
16 Committee paid for that footage, and the Respondents make no such claim. As such, we
17 recommend that the Commission find reason to believe that HVEDC made a prohibited
18 corporate contribution and that Eldridge and the Committee knowingly accepted that
19 contribution. We propose to investigate the ownership and costs of the footage to determine the
20 scope of the apparent violation and recommend that the Commission authorize compulsory
21 process as necessary. As to the coordination claim, it appears that the original video footage was
22 created for an ongoing business venture and used in an advertisement that does not satisfy the
23 Commission's coordination regulation. We therefore recommend that the Commission find no

reason to believe that HVEDC made, or that Eldridge and the Committee knowingly accepted, an in-kind contribution as a result of a coordinated communication.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Sean Eldridge is a candidate for Congress in the 2014 general election for New York's Nineteenth Congressional District. He filed his Statement of Candidacy with the Commission on February 1, 2013, but did not launch his campaign until September 2013.² On September 22, 2013, Eldridge released a campaign video titled "Why I'm Running."³ The campaign ad is two minutes and forty-eight seconds long and covers Eldridge's family background, work, qualifications, and reasons why he is running for Congress. The Committee disclosed a disbursement in the amount of \$67,450 made to SKDKnickerbocker, LLC for "Media Production Services" on October 2, 2013 in its 2013 Year End Report filed with the Commission, presumably related to the "Why I'm Running" ad.⁴

Eldridge is also a businessman and founder of Hudson River Ventures, LLC, a company that invests in small businesses in the Hudson Valley area of New York State.⁵ HVEDC is a non-profit corporation specializing in assisting businesses with relocating to the Hudson Valley

² Ariel Zangala, *Sean Eldridge Launches Bid for 19th Congressional District (with video)*, DAILY FREEMAN (Sept. 23, 2013), <http://www.dailyfreeman.com/general-news/20130923/sean-eldridge-launches-bid-for-19th-congressional-district-seat-with-video> (indicating that Eldridge "launched his long-rumored campaign with a video on his website . . . and issued a press release about his run").

³ See *Why I'm Running*, <http://www.youtube.com/watch?v=FKsq4d889lk> (Sept. 22, 2013).

⁴ Thus far, the Committee has also made disbursements totaling \$75,252 to the same firm for "media consulting services" from March 2013 through June 2014.

⁵ See <http://www.hudsonriverventures.com/>.

1 area by providing market data, property site information, and other services.⁶ Eldridge sits on
2 the board of directors for HVEDC.⁷ It also appears that Michael Oates, the Committee treasurer,
3 was the previous President and CEO of HVEDC before moving to Hudson River Ventures, LLC
4 in February 2013.⁸ Laurence Gottlieb now serves as HVEDC's President and CEO.⁹ Footage of
5 Gottlieb speaking to the camera in both the campaign and HVEDC advertisements is central to
6 the claims raised in this MUR.

7 On May 30, 2013, HVEDC published an ad entitled "Hudson Valley 3D Printing
8 Announcement" discussing the launch of a 3D printing initiative called the "Hudson Valley
9 Advanced Manufacturing Center at SUNY New Paltz" that involves a partnership between
10 private businesses and government groups.¹⁰ Eldridge is one of those partners, providing
11 funding in the amount of \$250,000 for the project along with committing an additional \$500,000
12 in investments for local businesses, and is also one of the featured speakers in the ad.¹¹ In fact,
13 Eldridge had a prominent role in the ad as he is the first speaker to appear in the ad announcing

⁶ See http://www.hvedc.com/webpages/about_us_over.aspx (last visited Sept. 16, 2014); NYS DEPT. OF STATE, http://www.dos.ny.gov/corps/bus_entity_search.html (search for "Hudson Valley Economic Development Corporation").

⁷ See http://www.hvedc.com/webpages/about_us_board.aspx.

⁸ *HVEDC's Mike Oates Moving on the New Venture* (Jan. 7, 2013), http://www.hvedc.com/webpages/about_us_Mike_Oates_Press.aspx. Oates is now CEO of Hudson River Ventures. See *Michael Oates, Executive Profile*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/person.asp?personId=225953374&privcapId=225952619&previousCapId=225952619&previousTitle=Hudson%20River%20Ventures,%20LLC>.

⁹ See *HVEDC Names Gottlieb as New President, CEO* (Feb. 6, 2013), http://www.hvedc.com/webpages/about_us_Gottlieb_appointment.aspx.

¹⁰ *Hudson Valley 3D Printing Announcement*, <http://www.youtube.com/watch?v=zch0hfomHlo> (May 30, 2013).

¹¹ *Id.*

1 the initiative and the final speaker closing out the ad. The HVEDC ad features additional
2 speakers, including Gottlieb, and displays images of 3D manufacturing equipment.¹²

3 The footage of Gottlieb at issue comprises approximately 17-31 seconds of audio and
4 video material that appears in some combination in both ads, featured in the campaign ad from
5 1:36 to 1:53 and in the HVEDC ad from 1:40 to 2:11. In both ads, that footage shows Gottlieb
6 speaking to the camera, wearing the same clothing and making the same statement. Nonetheless,
7 that footage also differs in a manner suggesting that the Committee had access to non-public
8 HVEDC footage. In both ads, Gottlieb states that "we are proud that we are able to pull together
9 a dream team of economic development professionals and organizations: Sean Eldridge, Central
10 Hudson, SUNY New Paltz"¹³ But the campaign ad shows Gottlieb on screen speaking to
11 the camera for the duration of his statement. By contrast, the earlier HVEDC ad cuts to video
12 footage of 3D printing machinery while Gottlieb's voice completes the statement. Because the
13 extended video footage of Gottlieb making the same statement in the same clothing does not
14 appear in the publicly-available HVEDC ad — footage that does not appear to be otherwise
15 publicly available — the Committee evidently obtained that footage from another source.¹⁴

16 HVEDC and Eldridge and the Committee submitted separate but virtually identical
17 Responses. They state that the Complaint fails to establish that the HVEDC and campaign ads

¹² *Id.*

¹³ See *Why I'm Running*, <http://www.youtube.com/watch?v=FKsq4d889lk> (Sept. 22, 2013); *Hudson Valley 3D Printing Announcement*, <http://www.youtube.com/watch?v=zch0hfomHlo> (May 30, 2013).

¹⁴ Similarly, Gottlieb's statement that "[w]e see 3D printing as being an exciting technology with so many applications" is used in both ads, but the HVEDC ad features Gottlieb making part of this statement while he is on screen. The campaign ad, however, features only the audio portion of this statement while images of 3D manufacturing equipment are shown on the screen. Although this variance does not necessarily indicate that the Committee obtained non-public video footage of 3D printing machinery from HVEDC, given the footage of Gottlieb it is possible that HVEDC was the source of that video footage as well.

1 used the same footage and assert that the footage at issue in both ads differs.¹⁵ They further
2 contend that even if the footage were identical, it was freely available to the public and
3 constitutes only a small part of the campaign ad and therefore does not violate the Act.¹⁶ Neither
4 Response identifies where the Committee obtained the footage or if that source was publicly
5 available. Nor do they state the cost to produce the footage or whether the Committee paid for
6 its use. The Response of HVEDC nonetheless acknowledges that the Complaint "correctly
7 point[s] out that the video 'is clearly the property of HVEDC' and 'is used to promote a project
8 of HVEDC.'"¹⁷ The Committee's reports filed with the Commission do not disclose any
9 payment to HVEDC.

10 **B. Legal Analysis**
11

12 The Complaint alleges that the use of the HVEDC footage in the Eldridge ad resulted in a
13 prohibited in-kind corporate contribution. Corporations are prohibited from making a
14 contribution to a candidate's committee in connection with a federal election, and candidates are
15 prohibited from knowingly accepting or receiving a prohibited contribution.¹⁸ A "contribution"
16 includes "any gift, subscription, loan, advance, or deposit of money or anything of value made
17 by any person for the purpose of influencing any election for Federal office."¹⁹ "Anything of
18 value" includes all in-kind contributions, including the provision of goods or services without

15 Comm. Resp. at 2 (May 1, 2014); HVEDC Resp. at 2 (May 1, 2014).

16 Comm. Resp. at 2-4; HVEDC Resp. at 2-3.

17 HVEDC Resp. at 3.

18 See 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b (a)); 11 C.F.R. § 114.2(b)(1).

19 52 U.S.C. § 30101 (8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)); 11 C.F.R. § 100.52(a); see also 52 U.S.C. § 30118(b)(2) (formerly 2 U.S.C. § 441b(b)(2)) (adding that contribution or expenditure includes any direct or indirect payment . . . gift or money, or any services, or anything of value").

1 charge or at a charge that is less than the usual and normal charge.²⁰ The Commission's
2 regulations define "usual and normal charge" as "the price of those goods in the market from
3 which they ordinarily would have been purchased at the time of the contribution."²¹ The
4 Commission analyzes video footage as a thing of value and will determine whether there is a
5 resulting contribution based on an examination on whether transfer of that footage was
6 conducted under current market practices or whether payment was made at the usual and normal
7 charges.²²

8 As a not-for-profit entity incorporated in the State of New York, HVEDC is prohibited
9 from making contributions to candidates for federal office. If HVEDC provided the footage to
10 the Committee for its use at something less than the usual and normal charge, then HVEDC may
11 have made a prohibited corporate contribution to the Committee. By knowingly accepting this
12 contribution, Eldridge and the Committee would have also violated the prohibition on corporate
13 contributions as well.²³

14 HVEDC acknowledges that it is the owner of the footage in the original HVEDC ad.
15 Respondents nevertheless argue that this matter should be dismissed because the footage at issue

²⁰ See 11 C.F.R. § 100.52(d)(1).

²¹ *Id.* § 100.52(d)(2)

²² See, e.g., First Gen. Counsel's Rpt. at 7-8 and Statement of Reasons, Comm'rs Bauerly, Hunter, Peterson, Walther and Weintraub at 2, MUR 5964 (Schock for Congress) (analyzing video footage as a campaign asset and thing of value requiring payment at the usual and normal charge); Factual and Legal Analysis ("F&LA") at 10-11, MUR 6218 (Ball4NY) (analyzing video footage as a campaign asset that would have value).

²³ If the Committee received an in-kind contribution in the form of the video footage, that information should have been disclosed on its reports filed with the Commission. 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).

1 was "freely available" and could have been obtained from a publicly available source.²⁴ But the
2 Committee does not state where it obtained the footage — it merely asserts that *if* the footage
3 was obtained from a publicly available source, its use was permissible. Here, only the first
4 portion of the video footage of Gottlieb featured in the campaign's ad appears in the earlier
5 HVEDC ad, and no other known public source contains the campaign ad's more extensive
6 version of that same recording. Accordingly, it appears that the Committee had access to the
7 same raw footage that HVEDC used to create its earlier ad and that that footage likely was not
8 obtained from the public domain.

9 The Commission previously has addressed matters involving the transfer of film footage
10 to political committees. Where, as here, the footage was not otherwise available for public use
11 generally, the Commission has focused its analysis on whether the transaction involved an
12 appropriate payment for the assets. In MUR 6218 (Ball4NY), for example, the Commission
13 found no reason to believe that the transfer of videos and photographs between a non-federal
14 campaign and a federal committee constitute a transfer of assets because the respondents showed
15 that the videos were publicly available and that the committee had paid to use the photographs.²⁵
16 Similarly, in MUR 5964 (Schock for Congress), the Commission ultimately dismissed the matter
17 because the committee provided a contract and invoice documenting the cost of the footage and

²⁴ Respondents argue that this matter should be treated like republication cases where the Commission has dismissed allegations involving the use of campaign materials obtained from a publicly available source. *See, e.g.*, MUR 5743 (Betty Sutton) (Commission admonished a committee after determining that a republished candidate photo was incidental and likely had *de minimis* value); MUR 5996 (Tim Bee) (Commission exercised prosecutorial discretion to dismiss the allegation that a group republished photo of a candidate that comprised two seconds of a 30-second ad and was downloaded at no charge from candidate's publicly available website). Unlike those matters, however, the facts here do not involve the dissemination, distribution, or republication of materials produced by a campaign. *See* 11 C.F.R. § 109.23. Instead, the video footage at issue here was produced and distributed by a private entity and subsequently used by a campaign committee.

²⁵ *See* F&LA at 10-11, MUR 6218 (Ball4NY).

1 other information sufficient to conclude that the amount the committee paid was reasonable such
2 that further investigation would be unwarranted.²⁶

3 Unlike those MURs, the record here suggests that the Committee likely obtained the
4 footage from HVEDC, a private corporation, and there is no indication that the Committee paid a
5 usual and normal charge for it. Moreover, Eldridge's dual roles as the candidate and a principal
6 of HVEDC and the similar dual roles of the Committee treasurer further reasonably suggest that
7 the Committee may have obtained the footage for its use directly from HVEDC without
8 payment.

9 In addition, we find unpersuasive — at least at present — the view that the additional
10 footage in the campaign ad constitutes a *de minimis* variation from similar publicly-available
11 source material, therefore warranting dismissal even if it were obtained for free from a private
12 source. Certainly, the publicly available HVEDC ad features the same audio and all but a few
13 seconds of the same video used in the campaign ad. While the final Committee ad used less than
14 thirty seconds of the HVEDC ad, it would be premature to conclude that the Committee was not
15 given access to more HVEDC footage than ultimately was used in the final product, itself a
16 benefit in the production process. Indeed, as discussed above, in addition to the extended
17 Gottlieb video clip, the campaign ad also featured footage of 3D manufacturing equipment that
18 does not appear in the HVEDC ad, which together with the Gottlieb footage reasonably suggests
19 that the Committee may have had access to a larger quantity of footage from HVEDC or its
20 agents. Moreover, the overall cost of the Committee's ad appears to have been substantial even
21 without paying for the footage at issue — Commission disclosure reports reflect that the

²⁶ Statement of Reasons, Comm'rs Bauerly, Hunter, Peterson, Walther and Weintraub at 2-3, MUR 5964 (Schock for Congress).

1 Committee may have spent \$67,450 to produce the campaign ad, but there is no information in
2 the record regarding the value of the HVEDC footage.²⁷ Thus, although it appears that the
3 Committee received access to footage and did not reimburse its source, further investigation is
4 necessary to determine the full scope of that benefit, information necessary to the Commission's
5 informed decision concerning the appropriate exercise of its prosecutorial discretion in this
6 matter.²⁸

7 Therefore, we recommend that the Commission find reason to believe that HVEDC made
8 a prohibited corporate contribution and that Eldridge and the Committee knowingly received that
9 contribution in violation of 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)).

10 The Complaint also alleges that the original HVEDC ad may have been made for the
11 purpose of creating footage for Eldridge's campaign and therefore constituted a coordinated
12 expenditure between HVEDC and the Committee and an in-kind contribution to the
13 Committee.²⁹ Under 11 C.F.R. § 109.21(a), a communication is coordinated with a candidate, a
14 candidate's authorized committee, or agent of the candidate or committee when the
15 communication: (1) is paid for by a person other than that candidate or authorized committee;

²⁷ For this reason, prior matters in which the Commission has dismissed similar allegations as *de minimis* do not apply here without more information concerning the value of the footage, if any, that was actually transferred to the Committee for its use in producing the campaign ad. See First Gen. Counsel's Rpt. at 4 and Statement of Reasons, Comm'rs Bauerly, Hunter, Peterson, Walther and Weintraub at 2-3, MUR 5964 (reflecting dismissal as *de minimis* premised on documentation indicating \$750 cost of footage); F&LA at 7-10, MUR 6542 (Mullin for Congress) (dismissing prohibited corporate contribution allegation in connection with the use of a business name, facilities, vehicles and employees in a committee's ads based as *de minimis* where campaign asserted that the value of the contribution was \$1,425 and cost had been reimbursed).

²⁸ This matter is therefore unlike other cases involving the transfer of video footage that the Commission has dismissed at the reason to believe stage where the record included information competent to determine how the footage was obtained and whether it was in fact publicly available. See, e.g., First Gen. Counsel's Rpt. at 4-5, MUR 6514 (Make Us Great Again) (respondents provided sworn affidavits asserting that the footage was made available on its website and was publicly posted on YouTube and the committee stated that it independently obtained the footage from YouTube).

²⁹ Compl. at 3.

(2) satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and

(3) satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

Here, the HVEDC ad does not qualify as a coordinated communication because it fails to satisfy the content prong of the coordination regulations.³⁰ The content prong is satisfied if the communication at issue meets at least one of four content standards: (1) an electioneering communication; (2) a public communication that republishes campaign materials; (3) a public communication that contains express advocacy; or (4) a public communication that refers to a clearly identified candidate for federal office or political party that is distributed in that jurisdiction within either 90 or 120 days of an election.³¹ Neither the electioneering communications nor the 90-day pre-election public communications standard is implicated because the HVEDC ad aired more than a year before the June 24, 2014 primary election.³² Further, the HVEDC ad does not appear to republish campaign materials and does not expressly advocate Eldridge's election.

Because the HVEDC ad does not satisfy the elements of the Commission's coordinated communication test, we recommend that the Commission find no reason to believe that the HVEDC ad constituted a coordinated expenditure.

³⁰ 11 C.F.R. § 109.21(c).

³¹ *Id.*

³² See 2 11 C.F.R. § 109.21(c)(1), (4).

III. INVESTIGATION

We propose to investigate the cost and source of the footage and whether the Committee paid for it. We also will seek to ascertain the usual and normal charge for transfer of such footage if the investigation suggests that the Committee should have paid for it. We will seek to conduct our investigation through voluntary means, but request authority to use compulsory process, as necessary.


IV. RECOMMENDATIONS


1. Find reason to believe that Sean Eldridge and Sean Eldridge for Congress and Michael Oates in his official capacity as treasurer knowingly accepted a prohibited corporate contribution in violation of 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)).
2. Find reason to believe that Hudson Valley Economic Development Corporation made a prohibited in-kind corporate contribution to Sean Eldridge for Congress in violation of 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)).
3. Find no reason to believe that Hudson Valley Economic Development Corporation made, or that Sean Eldridge or Sean Eldridge for Congress and Michael Oates in his official capacity as treasurer knowingly accepted, an in-kind contribution as a result of a coordinated communication in violation of 52 U.S.C. § 30118 (formerly 2 U.S.C. § 441b) and 11 C.F.R. § 109.21.
4. Approve the attached Factual and Legal Analyses.
5. Authorize the use of compulsory process, as necessary.

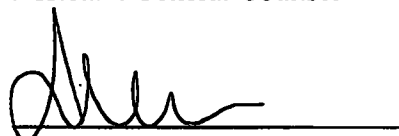
6. Approve the appropriate letters.

9/25/14
Date

BY:


Daniel A. Petalas
Associate General Counsel for Enforcement


Peter G. Blumberg
Assistant General Counsel


Ana J. Peña-Wallace
Attorney

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